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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues (Br. 13-14) that "[c]entral to the Government's position is the assertion that post-conviction relief is secondary, both constitutionally and in importance to the opportunity for direct appeal." He contends that our position denigrates the important role of collateral attack in redressing violations of the Constitution. Our reliance on the availability of a transcript to those who take direct appeal is particularly inappropriate, he asserts, because there is no constitutional right to appeal, whereas the Constitution provides that the privilege of the writ of *habeas corpus* shall not be suspended except in cases of rebellion or invasion (Article I, Section 9, Clause 2).

Our brief, however, does not analyze the difference between direct appeal and collateral attack in terms of their relative "importance." We contend that collateral review plays a limited role only in the sense that it

is designed to test "the very gravest of allegations" of error. *Kaufman* v. *United States*, 394 U.S. 217, 223-224. Such a limitation scarcely deprecates the importance of *habeas corpus* but, on the contrary, underscores its unique historical function.

We do not argue that respondent "bypassed" his right to collateral relief by not taking a direct appeal. What respondent bypassed by not appealing was a relatively simple means of access to a tool that would help him to investigate the details of his trial. He bypassed not the right to collateral relief, but the right to obtain a transcript without showing the need for one and without showing possible merit to his claim that the Constitution has been violated. Congress has established alternative means of obtaining a transcript: respondent has bypassed one of those means and now is confined to the other. Respondent's constitutional attack is based on the premise that Section 753(f) must be viewed in isolation, as if Congress never had established the alternative method of access to a transcript. But, of course, Congress did establish alternative routes, even though it was not constitutionally compelled to do so, and this Court must examine the operation of the entire program. That program, we submit, offers indigents a fair opportunity to have all of their claims adjudicated. To the extent Section 753(f) imposes additional requirements upon indigents who do not appeal, Congress was empowered to conclude that the requirements are justified both by the special nature of collateral review and by the imperatives of sound judicial administration.[1]

[1]We collected in our brief a number of cases so holding. A recent commentary critical of the decision below has collected additional cases supporting our position. See Note, *The Scope of the Indigent Federal Prisoner's Rights to a Trial Transcript—*

2. Respondent contends (Br. 6, 18-25) that the need and lack-of-frivolity requirements of Section 753(f) effectively suspend the writ of *habeas corpus*. This argument apparently has two components: (a) that an applicant for relief under 28 U.S.C. 2255 is treated less favorably than is an applicant for a writ of *habeas corpus;* and (b) that respondent will be unable to secure collateral relief unless he can obtain a transcript of his trial. We submit that the first argument is inaccurate as a matter of fact and that the second argument misperceives the meaning of Article I, Section 9, Clause 2, of the Constitution.

a. Respondent argues that under Section 753(f) a petitioner for a writ of *habeas corpus* challenging a state conviction receives a trial transcript as a matter of course, while a federal convict applying pursuant to Section 2255 must demonstrate a particularized need for a transcript. This difference, he contends, amounts to a "suspension" of the privilege of *habeas corpus* as to the latter group. The premise of this argument is, however, incorrect.

It is true that Section 753(f) does not, in terms, require a particularized showing of need in *habeas corpus* cases. We have adverted to this apparent disparity of treatment at pages 32-33, n.21, of our brief. We agree with Mr. Justice Blackmun's observation that Congress, in including language in the 1965 amendment of Section 753(f) requiring a showing of particularized need for a transcript in Section 2255 proceedings,

MacCollom v. *United States*, 7 Conn. L. Rev. 479, 490-492, n. 74 (1975). See also *United States ex rel. Buford* v. *Henderson*, 524 F.2d 147 (C.A. 2) (there is no constitutional need to provide an indigent with a trial transcript to comb for errors if he had access to a transcript on appeal). Cf. *Britt* v. *McKenney*, C.A. 1, No. 75-1279, decided January 23, 1976 (there is no constitutional need to provide an indigent with a transcript of a post-arrest probable cause hearing; *Commonwealth* v. *Britt*, 285 N.E.2d 780 (Mass.), endorsed).

apparently gave little consideration to the fact that the existing statute did not contain an identical requirement in the case of *habeas corpus*.[2] Blackmun, *Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 356-357 (1967). The reason for this, however, is apparent from the legislative background: the 1965 amendment was designed to answer the question (as to which the circuits were divided) whether the courts had any power to order transcripts at public expense in Section 2255 proceedings. At the time Congress acted there was unanimous agreement among the federal courts that the provision of a verbatim transcript could be conditioned upon a showing of particular need in *habeas corpus* proceedings, and such has continued to be the view of the courts.[3] In light of that agreement, Congress' inclusion of language requiring an identical showing with regard to the provision of a transcript for use in a Section 2255 motion was simply "a legislative recognition of the [judicial] practice in dealing with the other kinds of proceedings."[4] *Benthiem* v. *United States*,

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[2]Prior to 1948 no statute required the stenographic recording of proceedings in any federal case, civil or criminal. *Miller* v. *United States*, 317 U.S. 192, 197. 28 U.S.C. 753 was enacted in 1948 to create a system of official salaried reporters and to provide, *inter alia*, that all proceedings in criminal cases had in open court would be recorded. Section 753(f) gave the courts explicit power to order transcripts in criminal and *habeas corpus* cases, but, until 1965, the statute was silent on whether they could do so in connection with Section 2255 motions.

[3]See the cases collected in the second paragraph of note 6, page 13, of our opening brief.

[4]The 1965 amendment to Section 753(f) adopted verbatim a draft originally proposed by the Judicial Conference of the United States. See *1961 Proceedings of the Judicial Conference of the United States* 100.

403 F.2d 1009, 1011 (C.A. 1). See *Ketcherside* v. *United States*, 317 F.2d 807, 808 (C.A. 6); *United States* v. *Hoskins*, 85 F. Supp. 313, 314 (E.D. Ky.); *United States* v. *Lawler*, 172 F. Supp. 602, 605 (S.D. Tex.). Because, to our knowledge, no court has held that a verbatim trial transcript must be furnished to a prisoner on demand in a *habeas corpus* case, Section 753(f) does not discriminate between Section 2255 and *habeas corpus* proceedings and cannot "suspend" the availability of *habeas corpus* to federal prisoners.

b. It may be accurate for respondent to contend that without a transcript he cannot reasonably expect to obtain collateral relief.[5] But this does not indicate that the privilege of *habeas corpus* has been suspended. The privilege secured by Article I, Section 9, Clause 2, is not a guarantee of success; the Constitution simply secures to those in custody the privilege as it was known in England when the Constitution was adopted and as it has developed at common law. *Ex parte Bollman*, 4 Cranch 75, 93-94; *Ex parte Watkins*, 3 Pet. 193; *Stidham* v. *Swope*, 82 F. Supp. 931 (D. Cal.). The privilege has never, either at common law or by statute, included an unconditional right to a free verbatim trial transcript. Consequently, Congress did not "suspend" the privilege by declining to alleviate respondent's difficulties in making the showings that have always been necessary either to obtain a transcript or to obtain collateral relief. Cf. *United States* v. *Hayman*, 342 U.S. 205.

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[5]Of course, it is far from clear that a transcript would be of any use to respondent, who saw so little prospect of being successful on appeal that he bypassed appeal in favor of an immediate motion in the district court to reduce sentence (Resp. Br. 3). (We are willing to accept *arguendo* the assertions of fact made at Resp. Br. 3-4. We observe, however, that a number of those assertions are *dehors* the record.)

3. If respondent were correct that the Constitution requires the government unconditionally to provide him with a transcript of his trial for use in preparing a motion for collateral relief, it would seem to follow that the Constitution requires the provision of other legal services, such as appointment of counsel, as well. It is but a short logical step from respondent's argument that he cannot frame his claim "effectively" without a transcript to a prisoner's claim that he cannot do so (with or without a transcript) unless he has the assistance of counsel. Indeed, under respondent's reasoning (*e.g.*, Br. 14, 36) the right to appointed counsel would be even more "absolute" on collateral attack than it is now on direct appeal, since there is no constitutionally guaranteed right to appeal. Yet the courts of appeals without exception have held that an indigent has no absolute right to counsel for purposes of collateral review.[6] Section 753(f) merely establishes the same

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[6]See, *e.g.*, *Vandenades* v. *United States*, 523 F.2d 1220 (C.A. 5); *United States* v. *Masters*, 484 F.2d 1251, 1253 (C.A. 10); *United States ex rel. Johnson* v. *People of the State of Illinois*, 469 F.2d 1297, 1300 (C.A. 7), certiorari denied *sub nom. Johnson* v. *Illinois*, 411 U.S. 920; *Eaton* v. *United States*, 437 F. 2d 362, 363 (C.A. 9), certiorari denied, 402 U.S. 931; *Tweedy* v. *United States*, 435 F.2d 702, 703 (C.A. 8); *Aubut* v. *Maine*, 431 F.2d 688 (C.A. 1); *Tucker* v. *United States*, 427 F.2d 615, 617-618 (C.A. D.C.); *United States ex rel. Gordon* v. *Reincke*, 415 F.2d 1126, 1128 (C.A. 2); *United States ex rel. Worlow* v. *Pate*, 411 F.2d 972 (C.A. 7), certiorari denied *sub nom. Lane* v. *Pate*, 403 U.S. 921; *United States* v. *Brierley*, 392 F.2d 197, 198 (C.A. 3), certiorari denied *sub nom. Manning* v. *Brierley*, 393 U.S. 882; *Queor* v. *Lee*, 382 F.2d 1017 (C.A. 5); *Douglas* v. *Maxwell*, 357 F.2d 320 (C.A. 6), certiorari denied, 385 U.S. 858; *Crowe* v. *United States*, 175 F.2d 799, 801 (C.A. 4), certiorari denied, 338 U.S. 950. Cf. *Coppedge* v. *United States*, 369 U.S. 438; *Johnson* v. *Avery*, 393 U.S. 483, 488 ("It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief.").

standard in regard to transcripts that all eleven courts of appeals consistently have applied in determining whether to appoint counsel in collateral proceedings.

For these reasons, in addition to the reasons set out in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

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